

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

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FEIST PUBLICATIONS, INC.,

*Petitioner,*

—v.—

RURAL TELEPHONE SERVICE COMPANY, INC.,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

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**BRIEF AMICUS CURIAE OF THE  
ASSOCIATION OF AMERICAN PUBLISHERS, INC.  
IN SUPPORT OF RESPONDENT**

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**BRIEF *AMICUS CURIAE* OF THE  
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IN SUPPORT OF RESPONDENT**

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**PRELIMINARY STATEMENT**

The Association of American Publishers, Inc. ("AAP") respectfully submits this brief, *amicus curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of respondent. This brief is submitted upon the written consent of petitioner and respondent, filed herewith.

Given the petitioner's direct and wholesale copying of the respondent's "white pages" directory for purely competitive commercial purposes, AAP believes that this case was correctly decided by the courts below and should be affirmed. AAP also believes it to be unwarranted, unnecessary and



unwise to announce in this case broad rules which could have an unintended and unwarranted impact on the issue of the protection to be accorded to compilations other than the type here involved.

### INTEREST OF THE *AMICUS CURIAE*

AAP is the major trade association of book publishers in the United States. AAP's more than 200 members include most of the leading commercial book publishers in the United States, as well as many smaller and non-profit publishers, university presses and scholarly associations. AAP's members collectively publish a preponderance of all general and educational books published in the United States.

Among the wide range of works published by AAP's members are works that fall within the broad definition of "compilation" as found in the Copyright Act of 1976, 17 U.S.C. § 101 (1988) ("the Copyright Act"). The social utility of such compilations is inestimable given the vast array of readers and disciplines whose requirements they serve, spanning, among others, the educational, political, historical, literary, legal, scientific, commercial and financial sectors.

The compilations published by AAP's members draw upon and synthesize pre-existing non-copyrightable facts and data, sometimes collecting such facts and data from materials which constitute copyrightable subject matter. In other cases, the facts and data are developed by substantial original research, such as in a transportation database where all of the mileage distances are actually measured. The publishers of such compilations, often with great effort and energy, extract such information from diverse sources and arrange and present it for public consumption. The substantial creativity often exercised in locating that information and determining the content of a compilation and how to cull that information from available sources together with the unflagging public demand for compilations presenting facts and data in readily usable form have endowed the compilations

published by AAP's members with significant social utility and tremendous economic value. In order to maintain publishers' incentives to expend substantial resources in the development, collection and assemblage of facts and data, strong copyright protection is necessary and appropriate.

### STATEMENT OF THE CASE

This case is another in a long line of cases grappling with the issue of the proper scope of copyright protection to be accorded "white pages" directories. The present controversy pits a provider of telephone service, Rural Telephone Service Company, Inc. ("Rural"), which compiles, prepares, publishes and distributes annual telephone directories covering its telephone service area, against a competing publisher, Feist Publications, Inc. ("Feist"), which published and distributed a telephone directory covering some of the same geographical areas covered by Rural's annual directory. The record facts indicate that, following an unsuccessful effort to procure a license from Rural, Feist utilized on a wholesale basis entries in Rural's directory in compiling its own. While Feist undertook to verify and otherwise update listings as they appeared in Rural's directory, there is no dispute that it appropriated entries in Rural's directory in the first instance. *Rural Telephone Service Co., Inc. v. Feist Publications, Inc.*, 663 F. Supp. 214, 216-17 (D. Kan. 1987), *aff'd*, 916 F.2d 718, 40 Pat. Trademark & Copyright J. (BNA) 504 (10th Cir. 1990), *cert. granted*, 111 S. Ct. 40 (1990).

Both the district court and the court of appeals rejected Feist's claim that its verification activities and reorganization of the information it had obtained from Rural's directory immunized it from a finding of infringement. Citing the "substantial precedent which holds a ["white pages"] telephone directory is a compilation copyrightable under the United States Copyright laws," the courts below found Feist to have infringed Rural's copyright in its compilation. *Rural Telephone Service Co., Inc. v. Feist Publications, Inc.*, 916

F.2d 718, 40 Pat. Trademark & Copyright J. (BNA) 504 (10th Cir. 1990).

### SUMMARY OF ARGUMENT

This case involves the wholesale copying of "white pages" listings by a direct competitor, for purely commercial purposes. If copyright protection for compilations means anything, it must mean that wholesale copying under these circumstances is an infringement. Thus, AAP urges affirmance.

The resolution of the issue of the scope of protection for compilations has to date occurred on a case-by-case basis—by publishers' editorial and legal judgments, and, where disputes have arisen, by the courts. These dispositions, not unlike that of the courts below, reflect the fact-specific nature of the controversies, and suggest the advisability of allowing the law to develop on a case-by-case basis so as to continue to strike the appropriate balance between according necessary copyright protection to compilations and affording the public access to non-copyrightable information embodied in such compilations. There is no need for a broadly framed ruling from this Court in this case which is not the appropriate vehicle for the formulation of broad standards which govern the extent of protection which should be accorded to compilations. Accordingly, AAP respectfully submits that a summary affirmance of the decision below is appropriate.

### ARGUMENT

#### I.

#### GIVEN THE FACTS ON WHICH THE COURTS BELOW REACHED THEIR RESULT, THE COURT OF APPEALS' DECISION SHOULD BE SUMMARILY AFFIRMED

That the "white pages" telephone directories published by Rural are copyrightable in the first instance is not in issue. Rather, the Court is here confronted with determining the scope of copyright protection to be accorded compilations in the context of the wholesale copying for competitive commercial purposes of "white pages" telephone directories. For copyright protection to mean anything as far as such compilations are concerned, it must surely mean that the type of copying involved here constitutes a clear instance of infringement. Therefore, the decision below should be summarily affirmed.<sup>1</sup>

Further, as a practical matter, tolerating wholesale copying by a competitor for purely commercial purposes would undoubtedly reduce incentives to create socially useful compilations. Substantial creativity and resources are frequently invested in the collection, assemblage and development of the information contained in compilations.

In general, commercial compilers must first decide what kind of information would be useful and to whom the compilation could be sold. Compilers must preliminarily conduct exhaustive research as to existing reliable sources for the desired facts or data. Having chosen the most useful and trustworthy sources, compilers must select, verify and, when necessary, update the information to be assembled in their compilations. Considering the often wide range of available sources from which to glean data or facts, the selection phase

<sup>1</sup> Such affirmance would not preclude future use of individual facts even if they were contained in another compilation. Petitioner here did not take individual facts but, rather, entire portions of a compilation of those facts.



is frequently a monumental undertaking in and of itself. Compilers must next set about to assemble the selected facts or data in a coherent form that is readily comprehensible and usable by the particular segments of society to which such compilations are targeted. This stage of the development of the compilation is shaped by sophisticated and complex business and marketing decisions concerning both the range and needs of the potential users of the relevant compilations. Finally, compilers must continually make trade-offs between comprehensiveness, cost and ease of use.

Given the substantiality of the resources expended by compilers, and the extreme usefulness of their product in a highly information-oriented and increasingly diversified society, compilations are of tremendous economic value to authors, publishers and users. Where, as here, extensive copying for commercially competitive purposes has admittedly taken place, the Court's failure to summarily affirm a finding of infringement would effectively sanction bodily appropriation by second compilers such as Feist of previously existing compilations and reduce publishers' and other compilers' incentives to engage in costly and time-consuming compilation efforts, thereby ultimately impinging upon the creation of many important works.

## II.

### THE COURT SHOULD LIMIT ITS RULING TO THE FACTS OF THIS CASE AND AVOID A BROAD RULING ON THE PROTECTABILITY OF ALL COMPILATIONS

"White pages" telephone directories constitute but one type of directory protected by the Copyright Act under the much broader rubric of "compilations." As defined in the Copyright Act, a "compilation" is a "work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101.

Beyond the realm of "white pages" directories lies a universe of compilations, many of which are published by AAP's members. While some of AAP's members publish specialized directories akin to "white pages", others publish bibliographies, chronologies, anthologies, abstracts, encyclopedias, dictionaries, guides to stocks and bonds, compilations of corporate information, biographical directories, test questions, court decisions, atlases and numerous other types of compilations serving a variety of sectors as vast and diverse as the range of published compilations.<sup>2</sup>

Given the vast array of compilations and instances of use of such compilations having little relationship to the facts at hand, this case is not an appropriate vehicle for painting with a broad copyright brush. Indeed, a number of courts have recognized that the copyright considerations raised by "white pages" directories may be unique and that the outcomes in such cases, and the rationales therefor, do not necessarily lend themselves to rules of general applicability. Illustratively, in *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981), the Fifth Circuit reasoned that "it may be better to recognize the directory cases as being in a category by themselves rather than to attempt to bring their result and rationale to bear on non-directory cases." *Id.* at 1370. See also *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 91 (C.C.A. N.Y.), *cert. denied*, 259 U.S. 581 (1922) (recognizing that directories represent a "totally different kind of publication" than an annotated compilation of one of Shakespeare's plays).<sup>3</sup>

<sup>2</sup> The wide variety of compilations is described in the *amicus* brief submitted by the Information Industry Association and ADAPSO, at pages 7 through 9.

<sup>3</sup> The regulatory environment governing the publication of "white pages" telephone directories and the antitrust concerns raised by such directories also set them apart from other types of compilations. As regulated monopolies, providers of local exchange telephone service collect the information contained in their "white pages" directories in the course of discharging their obligations to provide telephone service arising out of government-sanctioned awards of franchises. In some

Nor is there a need for a ruling in this case on the alternative approaches to defining the scope of the protection conferred upon "white pages" directories and compilations generally. In light of the massive and direct appropriation by Feist of the information contained in Rural's "white pages" directory for competitive commercial purposes, the result here, on whatever rationale, be it the "industrious collection" theory<sup>4</sup> or the "selection, coordination or arrangement" theory<sup>3</sup> can be viewed as unexceptional and worthy of affirmance.

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ances, telephone companies' monopoly franchises are conditioned on their publication of "white pages" directories. See, e.g., *Illinois Bell Telephone Co. v. Haines and Co., Inc.*, 905 F.2d 1081, 1084 (7th Cir. 1990); *Hutchinson Telephone Co. v. Frontier Directory Co. of Minnesota, Inc.*, 770 F.2d 128, 129 (8th Cir. 1985). The terms of telephone franchises have traditionally provided for the listing of all telephone subscribers in the "white pages" directory without an additional charge, and generally authorize providers of service to charge subscribers in return for their omission from "white pages" directories as a "non-published number."

Given the monopolistic nature of telephone companies' government-awarded franchises, it is not surprising that "white pages" directories cases frequently involve antitrust issues. See, e.g., *Illinois Bell Telephone Co. v. Haines and Co., Inc.*, 905 F.2d at 1086-88; *BellSouth Advertising & Publishing Corporation v. Donnelley Information Publishing, Inc.*, 719 F. Supp. 1551, 1562-63, 1565-69 (S.D. Fla. 1988). Indeed, such issues, while not before this Court, were addressed by the district court below. *Rural Telephone Service Co. v. Feist Publications, Inc.*, 737 F. Supp. 610 (D. Kan. 1990).

AAP believes that the regulatory and antitrust overtones of "white pages" telephone directories compel a careful application of copyright principles by this Court in recognition of the unusual nature of this variety of compilation.

<sup>4</sup> See, e.g., *Hutchinson Telephone Co. v. Frontier Directory Co. of Minnesota, Inc.*, 770 F.2d 128, 131 (8th Cir. 1985); *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5 (7th Cir. 1977); *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. at 88.

<sup>3</sup> See, e.g., *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 573-74 (9th Cir. 1987), cert. denied, 485 U.S. 977 (1988).

## CONCLUSION

For the foregoing reasons, *amicus* urges summary affirmance of the ruling below.

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